No. 19-6976

In the
Supreme Court of the United States

James Clayton Johnson,

Petitioner,

v.

State of Arizona,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Hidalgo v. Arizona*, 138 S.Ct. 1054 (2018), Justice Breyer—joined by Justices Ginsburg, Kagan, and Sotomayor—wrote a statement respecting the denial of certiorari. While Justice Breyer was concerned with the constitutionality of Arizona's death-eligibility scheme—under which nearly 99% of all first-degree murder cases qualify for at least one eligibility factor—review was not proper because the trial court had denied the petitioner's request for a hearing. Without a hearing, evidence of the petitioner's factual allegations regarding the breadth of Arizona's scheme was "limited and largely unexamined by experts and the courts below in the first instance." Because future "defendants may have the opportunity to fully develop a record with the kind of empirical evidence that the petitioner" offered, review of a different case was preferable.

James Johnson requested an evidentiary hearing so experts and the court could examine his allegations in the first instance. The trial court denied his request. On appeal, the Arizona Supreme Court further denied his request for an evidentiary hearing.

Does a court deprive a capital defendant of his due process right to a meaningful opportunity to be heard when the defendant challenges the constitutionality of a state's capital-punishment scheme and asks to present previously unexamined evidence on the issue, but the court denies his request for an evidentiary hearing and factual findings?

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INTRODUCTION

No person should be sentenced to death under an unconstitutional death scheme. The underlying issue in this case is whether Arizona's death scheme is constitutional. However, Johnson is left unable to sufficiently present that argument because he was denied an evidentiary hearing.

The state of Arizona wants this Court to ignore Johnson's request for an evidentiary hearing because the Arizona Legislature subsequently amended the death scheme. The state believes this Court should turn a blind eye to the possibility that Johnson—and several other capital defendants—will be put to death under an unconstitutional scheme.

But once errors and misstatements are stripped from the state's Brief in Opposition, what remains is a compelling case for why this Court should order an evidentiary hearing.

REPLY

Johnson raised a legitimate claim that Arizona's death scheme is unconstitutional. As the number and breadth of aggravating factors expand, death schemes move further away from the narrowing function they were meant to serve. But he was denied an evidentiary hearing to prove this claim.

Since at least 1863, this Court has held that due process requires that people in Johnson's position have the opportunity to be heard and defend themselves. *Baldwin v. Hale*, 68 U.S. 223, 233 (1863). This right to be heard is among the "immutable principles of justice which inhere in the very idea of free government …." *Holden v. Hardy*, 169 U.S. 366, 389 (1898). The right to be heard in a meaningful manner and at a meaningful time includes the right to raise challenges on appeal. *See Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956); *Gonzales v. U.S.*, 348 U.S. 407, 414-15 (1955). Due process requires "there must be findings adequate to make meaningful any appeal that is allowed." *Specht v. Patterson*, 386 U.S. 605, 610 (1967). These factual findings are important because this Court does not issue advisory opinions. *State of Alabama v. State of Arizona*, 291 U.S. 286, 291 (1934). This requirement is further bolstered by the increased need for procedural reliability in capital cases. *Monge v. California*, 524 U.S. 721, 733 (1998).

The state of Arizona does not contest any of this jurisprudence. Nor does the state contest Johnson's argument that his repeated requests for a hearing were denied. Instead, the state advances a series of inaccurate premises to posit that a capital defendant's life is not protected by the due process clauses. It seeks permission to proceed with its plans to put Johnson to death without ever giving him a meaningful opportunity to establish that the legislative scheme that produced his death sentence is unconstitutional. But these inaccuracies are easily corrected:

Inaccurate statement	**Correct statement**
Br. Opp., i: The state asserts "there were no disputed facts …." Br. Opp., 8: They similarly assert any "adversarial testing … can only serve to undermine" Johnson's claim.	Both parties disputed the facts. The expert opined that 856 of 866 first-degree murders would have been eligible for one or more aggravating factors. Appx. J, at Appendix-748. The state believed this number was lower. Appx. G, at Appendix-613. The defense believed this number was higher. Appx. J, at Appendix-748. Supposing the result would have gone against Johnson amounts to mere speculation.
Br. Opp., 3-4: "Johnson does not claim that the death penalty was wrongly imposed on him, or that the crime he committed … does not fall within an adequately narrow category of the 'worst' of all first-degree murders."	Johnson challenged the propriety of the death penalty and aggravating factors in his briefing below. *See* Appendix C, at Appendix-75-115. But without an evidentiary hearing, such an argument here would have been a request for an advisory opinion still necessitating the evidentiary hearing.
Br. Opp., 6: "In *Hamdi* and *Mathews*, this Court considered whether citizens are entitled to *any* proceedings before a court may deprive them of their liberty … or property …."	Both cases examined the sufficiency of the process provided, not just the existence of any process. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Hamdi v. Rumsfeld*, 542 U.S. 507, 513-14 (2004).

Inaccurate statement	**Correct statement**
Br. Opp., 6-7: "[N]o liberty interests were directly affected by the trial court's denial of an evidentiary hearing here because the requested hearing had no bearing on Johnson's detention."	The Due Process Clauses also protect life. U.S. Const. Amend. 5 ("No person shall be … deprived of life, liberty, or property, without due process of law …."), 14 § 1 ("... nor shall any State deprive any person of life, liberty, or property, without due process of law ….").
Br. Opp., 7: "[I]t would have been unduly burdensome—not to mention inappropriate—for the court to conduct an evidentiary hearing and determine whether aggravating factors could be proven beyond a reasonable doubt in unrelated criminal cases …."	Narrowing must occur at the legislative stage. *Gregg v. Georgia*, 428 U.S. 153, 196-97 (1976); *Proffitt v. Florida*, 428 U.S. 242, 248-51 (1976); *Jurek v. Texas*, 428 U.S. 262, 270-71 (1976). Thus, Johnson and the other defendants wanted to determine whether aggravators could be alleged. The burden was minimal compared to the need for increased reliability in death cases. Pet. Cert. 27-28.
Br. Opp., 7: Characterizing Johnson's argument as requiring "*every* first-degree premeditated murder [to] automatically qualify for the death penalty, regardless of the existence of additional aggravating factors."	There is no support for this assertion and it contradicts the requirement for legislative narrowing guaranteed by *Gregg v.*, 428 U.S. at 196-97; *Proffitt*, 428 U.S. at 248-51; and *Jurek*, 428 U.S. at 270-71. The logical extension of infrequency is not to increase imposition or eligibility; it is to decrease eligibility.

Once these inaccurate statements are corrected, the state's remaining argument is that this Court should reject certiorari because the Arizona Legislature amended the capital sentencing scheme and removed some aggravating factors.

Notably, the amendment was proposed to address the constitutional concern Johnson raised. The bill's sponsor, Sen. Eddie Farnsworth, explained the reason for the bill in an article published by the Arizona Capitol Times: "The courts have expressed concerns about constitutionality for all aggravators that exist in death penalty sentencing." Dillon Rosenblatt, "GOP bill scales back death penalty eligibility," Arizona Capitol Times (2/22/2019) (available at https://azcapitoltimes.com/news/2019/02/22/gop-bill-scales-back-death-penalty-eligibility/). To address these concerns, "[t]he county attorney said they would look at some of the aggravating factors … and take some of them away that haven't been used for some time." *Id.* And the lobbyist with the Maricopa County Attorney's Office—the office that prosecuted Johnson—said the bill was a "response to ongoing litigation over the death penalty … and how the statute can best be enhanced to ensure they are sustainable for the future …." *Id.*

The state of Arizona now seeks to use this legislative change to prevent Johnson—and similarly situated defendants—from ever securing meaningful review of the scheme they were sentenced under.

The legislative change, however, demonstrates why this Court should grant Johnson's request for an evidentiary hearing. Johnson will never be able to challenge his sentence under the new scheme. The legislative change offers no reason to reject Johnson's Petition. Moreover, any future hearing would challenge a different death scheme. The only way to secure Johnson's right to challenge the constitutionality of the scheme he was sentenced under is to grant certiorari and order an evidentiary hearing.

CONCLUSION

Johnson's argument is simple. This Court has long held that a person in Johnson's position has a due process right to a hearing and factual findings so that his appeal can have meaning. *Specht*, 386 U.S. at 610. But the lower courts denied Johnson's repeated requests for an evidentiary hearing. This rendered Johnson's primary argument—that Arizona's death penalty scheme is unconstitutional—meaningless. If Johnson had raised this argument in his Petition without factual findings or an evidentiary hearing, he would have done nothing more than request an advisory opinion. The trial court recognized this very point; the judge conceded he would conduct an evidentiary hearing if he was overruled on the merits. Appendix H, at Appendix-679.

The state does not disagree with the crux of Johnson's argument. Setting aside misstatements and issues regarding legislative change, Johnson's syllogism remains undisturbed. This syllogism illustrates that the Arizona Supreme Court "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

Accordingly, this Court should grant certiorari, reverse the Arizona Supreme Court's ruling denying Johnson's request for an evidentiary hearing, and order this case remanded for an evidentiary hearing on the constitutionality of Arizona's death penalty scheme.

Respectfully submitted,

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